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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 254

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, PETITIONERS

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The memorandum opinion of the District Court for the District of Columbia (R. 5) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 8) and the subsequent opinion on motion for rehearing (R. 21) are reported in 83 F. (2d) 554, 562.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia was rendered February 17, 1936 (R. 8). On motion for rehearing a *per curiam* opinion was rendered on May 4, 1936 (R. 21). The petition for writ of certiorari was filed August 3, 1936, and was granted October 12, 1936. The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES AND TREATIES INVOLVED

The statutes and treaties involved are set forth in the Appendix, *infra*, pp. 51–112.

QUESTIONS PRESENTED

1. Whether the courts below, after the enactment of Public Resolution 53, have jurisdiction to entertain a suit by a German corporation to compel the return of enemy property and money seized under the Trading with the Enemy Act.

2. Whether the provisions of the Treaty of Berlin preclude a German corporation from questioning the validity of Public Resolution 53.

3. Whether, as applied to respondent, Public Resolution 53 is in violation of the Fifth Amendment to the Constitution.

STATEMENT

The facts as stated in the bill of complaint (R 1–4) may be summarized as follows:

Pursuant to the Trading with the Enemy Act the Alien Property Custodian seized the property in the United States of the Direction der Disconto Gesellschaft, which he had determined to be an alien enemy (R. 2). The property so seized was held by the Custodian, or deposited by him in the Treasury of the United States. Later, the property was transferred to a single account known as Trust No. 49851. (R. 2.)

About the year 1929 the Deutsche Bank and the Direction der Disconto Gesellschaft, both of which were German banking corporations, consolidated into a single corporation, the Deutsche Bank und Disconto Gesellschaft. The assets of the Direction der Disconto Gesellschaft thereupon became the assets of the Deutsche Bank und Disconto Gesellschaft, the respondent. (R. 1.)

Some time prior to February 16, 1933 (R. 2), respondent and/or its predecessor duly filed a notice of claim with the Alien Property Custodian for the property so taken, and made application to the President of the United States for its return. Prior to the commencement of this action the Alien Property Custodian determined that respondent's predecessor was the owner of said property at the time of seizure, and that respondent was entitled to its return. (R. 2.)

However, on March 16, 1931, one William H. Sprunt and others brought an attachment proceeding pursuant to the Trading with the Enemy Act, and the return of the property was thereby with-

held. On May 24, 1934, that action was discontinued. (R. 2.) Respondent thereupon demanded the return of the property from the Alien Property Custodian, but was refused.

On July 1, 1934, pursuant to executive order, the office of the Alien Property Custodian was abolished, and all its authority, rights, and duties transferred to the Attorney General, one of the petitioners herein. Respondent demanded the return of the property from petitioners, but the demand was refused pursuant to Public Resolution 53, which had been approved on June 27, 1934 (R. 3).

On October 3, 1934 (R. 1.), the respondent instituted the present action, praying that a decree be entered directing the return of cash in the amount of $541,041.44 and of certain stocks and bonds (R. 4). Petitioners filed a motion to dismiss (R. 4), which was granted by the District Court for the District of Columbia on March 12, 1935 (R. 5). On appeal to the Court of Appeals the judgment was reversed on February 17, 1936 (R. 19). On motion for rehearing the Court of Appeals adhered to its original position (R. 21–26).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that Public Resolution No. 53 did not withdraw the jurisdiction of the District Court for the District of Columbia to entertain a suit against the United States brought by a German

corporation to compel the return of enemy property seized and held under the Trading with the Enemy Act.

2. In holding that the Deutsche Bank und Disconto Gesellschaft, having filed a claim under the Settlement of War Claims Act of 1928, acquired vested property rights in property seized and held by the United States under the Trading with the Enemy Act, and, therefore, that with respect to said corporation, Public Resolution No. 53 is unconstitutional.

3. In failing to hold that the Deutsche Bank und Disconto Gesellschaft, as a German corporation, is precluded by the Treaty of Berlin from questioning the validity of Public Resolution No. 53 and the detention of property directed by that resolution.

4. In reversing the judgment of the District Court of the District of Columbia.

SUMMARY OF ARGUMENT

I

The present action is beyond the jurisdiction of the courts below, for the reason that Public Resolution 53 has prohibited payment to respondent of either the money or property in controversy. Consequently, any decree in the present suit would be without legal effect, and, for that reason, beyond the power of courts exercising true judicial power. *District of Columbia* v. *Eslin*, 183 U. S. 62. The

decision of the lower court to the contrary, based upon the proposition that the prohibition of payment was ineffective, is unsound, for plenary power to control the disposition of both the money and the property which are involved in the present case is in Congress.

In any event, Public Resolution 53 should be construed as a withdrawal of the consent of the United States to the entry of a mandatory decree such as that sought here. That consent was granted by the authorization of these officials to pay in response to a decree; removal of the authorization withdraws the consent. *Louisiana* v. *Jumel,* 107 U. S. 711, 727. Unless the resolution be so construed, Congress would have been consenting to a suit on the one hand and at the same time rendering it ineffective for all practical purposes. The language of the resolution bears out this construction. *Lynch* v. *United States;* 292 U. S. 571.

Even if jurisdiction exists despite the resolution, and even if the consent of the United States to be sued has not been withdrawn, nevertheless this suit is not permissible under the consent which was granted by the Trading with the Enemy Act, Section 9. Under that section suits are permitted only when a question of right, title, and interest to the property seized is in dispute. Here no such dispute exists and the suit may not, therefore, be maintained.

II

Assuming that the present action is within the jurisdiction of the courts below, nevertheless respondent has no standing to question the validity of the Resolution. By the Treaty of Berlin Germany has expressly consented to and confirmed all measures of detention which the United States may see fit to enact. Consequently, respondent, a German national which may complain of acts of the United States only through its sovereign (*United States* v. *Dickelman*, 92 U. S. 520) cannot now question the validity of the Resolution. See *United States* v. *Chemical Foundation*, 272 U. S. 1, 11.

III

Assuming that jurisdiction exists, and that respondent has a standing to question the validity of the Resolution, nevertheless, we submit that the Resolution, as applied to respondent, does not violate the Fifth Amendment.

A. The return of enemy property was a mere gratuity which Congress might at any time revoke or limit. *Lynch* v. *United States*, 292 U. S. 571. This conclusion is not inconsistent with *United States* v. *Cook*, 257 U. S. 523, and *United States* v. *Realty Company*, 163 U. S. 427, for they do not support a principle that an authorization of payment of an honorable or moral obligation creates a vested right which may not be withdrawn. Nor may a vested right be created by employing the

language of trusts. We submit that any gratuity authorized by the Settlement of War Claims Act of 1928, but never completed, should not be made effective and binding by the creation of a trust. In any event, the United States retained a power of revocation. *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449. Nor was a vested right created by the consent of the respondent to the retention of 20 percent of the property, for that consent lacked the elements of legal consideration, since the respondent had no rights which it could have relinquished. Moreover, the Settlement of War Claims Act was not a contractual offer in any sense.

B. Even if respondent acquired some rights to the return of the property, these rights were created subject to the treaties and agreements between the United States and Germany. By these treaties the United States reserved a right to deal with the property as it saw fit. Any rights which respondent has, therefore, are subject to the limitation that the United States might, under these treaties, take some further action. This limitation is particularly applicable in the present case, for this Court has always been very reluctant to recognize alleged rights which will fetter the political department of the government in meeting its responsibilities in the field of international affairs. *Mackenzie* v. *Hare,* 239 U. S. 299, 311.

ARGUMENT

PRELIMINARY STATEMENT

The present action is an attempt to question the validity of Public Resolution 53 (*infra*, p. 51). Before proceeding to a discussion of the issues involved, we believe it will be of material assistance to the Court if a summary statement is given of the background of that Resolution.

By the Trading with the Enemy Act, as amended (*infra*, p. 56), Congress provided that all enemy property should be seized by the Alien Property Custodian (Section 7 (c)), and that upon the termination of the war any claim to recover such property "shall be settled as Congress shall direct." (Section 12.) On July 2, 1921, a Joint Resolution was adopted which terminated the state of war between the United States and Germany (*infra*, p. 63). This resolution reserved to the United States and its nationals all rights which were stipulated for their benefit under the Treaty of Versailles, and declared a policy to make no disposition of sequestered German property until the German government had made suitable provision for the satisfaction of American claims. The Treaty of Berlin (*infra*, p. 67), which was concluded between the United States and Germany on August 25, 1921, and proclaimed on November 14, 1921, accorded to the United States all rights and privileges specified in the Resolution of July 2, 1921, and also incorporated all the rights and ad-

vantages stipulated for the benefit of the United States in the Treaty of Versailles. (Articles I, II, *infra*, p. 71.) By the Treaty of Versailles it was provided that property of German nationals which had been seized might be constituted as a pledge for enemy liabilities (Part X, Section IV, Article 297 (e) (*infra*, p. 75)) and that such property "shall be subject to disposal by such [Allied or Associated] Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto." *Id.*, Article 297 (h) (2) (*infra*, p. 76).) See also Article 297, Annex, par. 4 (*infra*, p. 77). Germany also obligated itself to compensate its nationals for any losses caused by the sale or retention of their property by the Allied or Associated Powers. (Article 297 (i).)

On August 10, 1922, a Mixed Claims Commission was established (*infra*, p. 79) to determine the claims of the United States and its nationals against Germany and to enter awards for the losses for which Germany was responsibile.

Through arrangements made by the Secretary of State with the Allied Governments, there was allocated to the United States under the provisions of the Finance Ministers' Agreement of January 14, 1925, 2¼ percent of all receipts paid by Germany which were available for reparation payments. In 1928, prior to the enactment of the Settlement of War Claims Act, the United States

was receiving approximately $11,000,000 annually from this source.[1] If, however, American claimants had been forced to rely solely upon these payments, approximately 60 years would have been required for payment in full. Some method was necessary by which claimants could obtain a more prompt payment. The Settlement of War Claims Act was the solution.[2]

By the Settlement of War Claims Act Congress authorized the return to German nationals of 80 percent of the aggregate value of property which had been seized.[3] The Act, in addition, created a German Special Deposit Account which was to be made up of the 20 percent retained; all moneys received and to be received from Germany on account of the awards of the Mixed Claims Commission (Section 4 (b)); and was to be further augmented by appropriations of the Congress. From this account the awards of the Mixed Claims Commission were to be paid in an established order of priorities (Section 4 (c)).

In 1930 the Debt Funding Agreement of 1930 (*infra*, p. 83) was entered into between the United

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[1] H. Rep. No. 1924, 73d Cong., 2d Sess., pp. 7–8, reprinted *infra*, pp. 95, 98.

[2] See Senate Rep. No. 273, 70th Cong., 1st Sess., p. 33.

[3] By the Winslow Act (Act of March 4, 1923, c. 285, 42 Stat. 1511) Congress had already authorized the return of property to former German owners up to the value of $10,000.

States and Germany. Under that Agreement provision was made for direct payment by Germany of an annual sum of 40,800,000 reichsmarks ($9,700,000 at the time the agreement was concluded, or about $16,300,000 at the present mint parity of the mark) for a period of 52 years. The total of these payments was equal to the amount that it was estimated would be due on Mixed Claims awards. In 1934, when it became evident that Germany was either unable or unwilling to satisfy its obligations under the Agreement,[4] and the contemplated payments by Germany into the German Special Deposit Account ceased, the Resolution here involved was enacted.[5]

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[4] The German default, in detail, is set forth in H. Rep. No. 1924, 73d Cong., 2d Sess., pp. 7–8: "On March 31, 1934, all of the installments aggregating 102,000,000 reichsmarks, previously postponed since September 30, 1931, together with the semiannual installment of 20,400,000 reichsmarks and semiannual interest of 2,550,000 reichsmarks, or a total of 122,400,000 reichsmarks (about $50,000,000), were due and payable. Germany advised that it could not meet the principal payments falling due, but would and did pay the interest due of 2,550,000 reichsmarks (about $1,000,000)."

[5] Prior to the passage of Public Resolution 53, Germany had enacted stringent regulations controlling foreign exchange which in effect "postponed" all payments to creditors on public and private obligations abroad.

Laws had also been enacted placing the foreign credits and claims payable in foreign exchange of German nationals at the disposition of the Reichsbank for the benefit of the German Government. Relevant provisions of a decree of February 4, 1935, which embodied all previous provisions regarding foreign exchange is set forth in the Appendix, *infra*, p. 110.

I

THE COURTS BELOW ARE WITHOUT JURISDICTION TO ENTERTAIN THE INSTANT SUIT

The Government urged below that the effect of Public Resolution 53 (*infra*, p. 51) was to deprive the courts of jurisdiction to entertain the present action. The District Court sustained the contention, but the Court of Appeals held that it had jurisdiction, and proceeded to declare the Resolution unconstitutional.

Public Resolution No. 53 (c. 851, 48 Stat. 1267) provides, in part, as follows:

> * * * So long as Germany is in arrears in any payments * * * under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: * * *.

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In brief, the resolution prohibits payments to claimants of either money or property during the time that Germany is in default, whether or not a judgment has been entered with respect to the claim.[6]

A. THE PRESENT ACTION IS USELESS FOR EVERY PRACTICAL AND LEGAL PURPOSE AND IS THEREFORE BEYOND THE JURISDICTION OF THE COURTS BELOW

With respect to money which has been deposited in the Treasury of the United States pursuant to Section 12 of the Trading with Enemy Act (*infra*, p. 60), we believe that there can be no serious question as to the power of Congress to enact such a prohibition. Article I, Section 9, clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;". This Court, in some instances relying upon that clause, and in some instances without referring to it, has frequently decided that no judgment or decree of any court can compel the payment of money from the

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[6] Congress empowered the President to remove the restrictions imposed by Public Resolution 53 in their application to the many classes of claimants who are not German nationals. This the President has done by Executive Order 6981, of March 2, 1935, and Executive Order 7111, of July 22, 1935. The restrictions now effective are those against the return of property to German nationals, restrictions imposed by Congress itself. No question of delegation of power is, therefore, raised in the present case. *Yazoo & Mississippi R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220; *Gorich* v. *Fox*, 274 U. S. 603, 606; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186.

Treasury unless there has been an authorization by Congress. See *District of Columbia* v. *Eslin*, 183 U. S. 62, 65; *United States* v. *Weld*, 127 U. S. 51, 56; *Hart* v. *United States*, 118 U. S. 62, 66; *Knote* v. *United States*, 95 U. S. 149, 154; *Commonwealth* v. *Boutwell*, 13 Wall. 526; *Reeside* v. *Walker*, 11 How. 271, 291.

The present action seeks to compel the Treasurer of the United States to pay to respondent a certain sum of money which he holds (R. 4). In view of the constitutional provision and the above cases, we believe the action in this respect clearly must fail. But there is a more fundamental objection, which goes to the jurisdiction both of this Court and of the courts below.

Congress, by the Resolution prohibiting payment of any judgment, has effectively destroyed the jurisdiction of any court exercising true judicial power. As has frequently been pointed out, courts in the exercise of such judicial power cannot enter decrees which will be without legal effect. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40, 46; *Gordon* v. *United States*, 117 U. S. 697, s. c. 2 Wall. 561. Of course, it is not essential in every case that process for execution be available (*Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249), but where an action is brought, not to determine the respective interests and rights of parties, but primarily to secure an order directing a public official to make a specific payment, then

it is beyond the jurisdiction of a court exercising judicial power to enter such an order where compliance by that official has been specifically and effectively prohibited by an act of Congress.

An almost direct precedent is furnished by *District of Columbia* v. *Eslin*, 183 U. S. 62. Congress had conferred upon the Court of Claims jurisdiction to pass upon the claims of certain persons against the District of Columbia. Pursuant to the Act, a decision had been rendered in their favor by the Court of Claims, and an appeal taken to this Court. Later Congress passed an Act providing that all proceedings pending under the enabling Act should be vacated, and that no judgment previously rendered in pursuance of said Act should be paid.

This Court held that the appeal must be dismissed for lack of jurisdiction, without any determination of the rights of the parties, because any judgment which it rendered would lack the sanction which attends the exercise of judicial power. Mr. Justice Harlan, speaking for the Court, stated (p. 65):

> In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, and the express prohibition of the payment of judgments theretofore rendered, any declaration by this court as to the correctness of the final judgment entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and would not

> be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government. It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. * * *

See also *Gordon* v. *United States*, 117 U. S. 697, 702, s. c. 2 Wall. 561; *Hart* v. *United States*, 118 U. S. 62.

The court below avoided this result upon two grounds, neither of which, we submit, is tenable. First, it stated that the constitutional requirement of an appropriation is inapplicable, because it applies only to "money of the United States" (R. 25), and not to money or property to which the United States does not "claim title" (R. 26). No authority is cited to sustain the addition of these qualify-

ing phrases to clause 7 of Section 9 of Article I of the Constitution. No authority which we have been able to find does so, and such a construction seems wholly inconsistent with the plenary power vested in Congress.[7] In any event, it is quite clear from the decisions of this Court that the property which was seized by the Alien Property Custodian is the property of the United States, and the former enemy owners were divested of every right in respect of the property taken. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9–11; *Woodson* v. *Deutsche, etc., Anstalt*, 292 U. S. 449, 453–454.

Second, the court below attempted to distinguish the *Eslin* case, *supra*, on the ground that it involved "not as here a property right, but a gratuity as to which Congress could give or withhold as it pleased." (R. 26.) We believe that fact, even if true, to be wholly immaterial. Whether the claim be for a mere gratuity, a claim for payment of a valid debt, or a claim for money held by the United States in trust, the power of Congress to provide for the disposition of the claim—that is, the *remedy* of the claimant, as distinguished from its *right*—is plenary. In any event, the attempted distinction is

[7] The language of the first part of clause 7 is to be contrasted with that of the second part, which provides that an account of the expenditure of all "*public* moneys" shall be published from time to time [italics supplied]. The use of the word "money" without any qualifying adjective in the first part, therefore, must indicate an intention to vest in Congress a control over *all* money in the Treasury of whatever character.

not supported by the facts, for the United States, having validly acquired all rights in the property seized (*United States* v. *Chemical Foundation, supra*), could have continued to hold it, and, as a matter of fact, any return of any part of the property was more in the nature of a gratuity to the enemy aliens than the payment of the contractual claims of the contractors in the *Eslin* case. See pp. 31–33, *infra*.

We believe that the power of Congress is also plenary with respect to the stocks and bonds which are still in the custody of the Alien Property Custodian, and which respondent seeks to have returned to it *in specie*. (R. 4.) By Article IV, Section 3, clause 2 of the Constitution, Congress is given a broad grant of power over all property constitutionally acquired by the United States. See *Ashwander* v. *Valley Authority*, 297 U. S. 288, 330. The power thus granted is merely a corollary of the power over money in the Treasury, and is, by the terms of the Constitution, equally as broad. There can be, of course, no question that the property here in question was lawfully acquired by the United States. Moreover, it is to be noted that a suit to recover the property so held is undoubtedly a suit against the United States, which can be maintained only after Congress has granted its consent. Practically, therefore, the control by Congress over the *remedy* of the claimant, is plenary. No superior power, we submit, is vested in the courts.

Of course, even assuming that no decree can be rendered which will be effective, Congress might have vested in the courts of the District of Columbia a jurisdiction to render declaratory judgments. See *O'Donoghue* v. *United States*, 289 U. S. 516, 545. Several factors indicate, however, that even on the assumption that Congress intended, by the Resolution, to authorize the court below to function in that capacity, the court did not purport to do so in the instant suit. First, the relief prayed for (R. 4) is a mandatory injunction, not merely a declaration of rights; second, by the terms of the judgment actually entered (R. 19) the court apparently instructed the District Court to enter an order requiring petitioners to turn over the money and property in question; and finally, no occasion exists here for the determination of any right or title of the claimant, for its right, title, and interest, subject only to the paramount rights of the United States, are not in dispute.

We submit, therefore, that, since the court below was without jurisdiction, its decision should be reversed, and the decision of the District Court, dismissing the bill for lack of jurisdiction, should be affirmed. *Smallwood* v. *Gallardo*, 275 U. S. 56, 62; *United States* v. *Huckabee*, 16 Wall. 414, 435–436.

B. PUBLIC RESOLUTION 53 WITHDREW THE CONSENT OF THE UNITED STATES TO THE MAINTENANCE OF THE PRESENT ACTION

Assuming, *arguendo*, that the prohibition of payment does not deprive the courts below of jurisdic-

tion by eliminating an essential factor in the exercise of true judicial power, we submit that in any event the Resolution should be interpreted as a withdrawal of the consent of the United States to be sued—at least to the extent that consent to the entry of a mandatory decree, as prayed herein, has been withdrawn. There can be no doubt, of course, that a suit under the Trading with the Enemy Act is a suit against the United States (*Becker Co.* v. *Cummings,* 296 U. S. 74), or that the United States cannot be sued without its consent (*Perry* v. *United States,* 294 U. S. 330; *Kawananakoa* v. *Polyblank,* 205 U. S. 349). Nor can there be doubt as to the power of Congress to withdraw that consent, once given (*Lynch* v. *United States,* 292 U. S. 571, 581–582). We believe that the Resolution did, in fact, withdraw consent to the maintenance of the present suit.

Under the Trading with the Enemy Act, as amended, a decree directing the Alien Property Custodian or Treasurer of the United States to return property lawfully held by the United States was admittedly a suit against the United States, but proper because Congress had authorized these officials to make the return (Section 12, *infra,* pp. 60, 62). That authorization has been removed by the Resolution, and, it having been withdrawn, it must follow that there is now no basis upon which to rest such consent, and the jurisdiction of the courts to enter such a decree against the United States has

ceased to exist. *Louisiana* v. *Jumel*, 107 U. S. 711, 727.

That Congress must have intended to withdraw its consent to the entry of mandatory decrees against petitioners is made clearly evident by the fact that a contrary intent would have created a completely anomalous situation. Even assuming that the prohibition of payment is beyond the power of Congress, nevertheless that body must have believed that it possessed the power to enact an effective prohibition, and it cannot reasonably be supposed that it would intend to permit the maintenance of a suit to secure an order against these officers directing the return of property and at the same time order its officers not to comply with that order.

That consent has been withdrawn is further evidenced by the language employed: payments shall be postponed "whether or not a judgment or decree has been entered with respect thereto." No mention is made of judgments which might thereafter be rendered, indicating again that Congress intended by the Resolution to remove any jurisdiction to render such judgments thereafter. The opposite situation in *Lynch* v. *United States*, 292 U. S. 571, led this Court to conclude that Congress had not intended to remove the right to sue. See 292 U. S. at p. 585.

"C. IN ANY EVENT, THE CONSENT TO SUE WHICH IS GIVEN BY SECTION 9 OF THE TRADING WITH THE ENEMY ACT DOES NOT ALLOW THE PRESENT SUIT

If jurisdiction exists despite the Resolution, and if the consent of the United States to be sued has not been withdrawn, there still remains the question whether the present suit is permissible under the consent which has been granted. That consent was given by the Trading with the Enemy Act, Section 9, as amended (*infra*, pp. 57, 58), and authorizes a claimant to—

> * * * institute a suit in equity in the Supreme Court of the District of Columbia * * * *to establish the interest, right, title, or debt so claimed,* and if so established the court shall order the payment * * *. [Italics supplied.]

The instant suit is not, however, a suit to establish an interest, right, or title within the meaning of the Act, for all questions of ownership at the time of seizure have already been determined (R. 2), and are not in issue here. The process of the courts is invoked solely to secure an order directing certain public officials to make a payment which they refuse to make at the present time because of specific instructions from Congress.

The Trading with the Enemy Act, however, apparently intended to allow a suit to be instituted only where it was necessary for the claimant to establish its right, title, and interest; that is, judicial

determination was provided when a question of ownership was in issue. See *Pilger* v. *Sutherland,* 57 F. (2d) 604, 606 (App. D. C.). Consequently, since the consent of the sovereign to be sued is a matter of grace only, and must be construed strictly against the one attempting to avail himself of the privilege (*Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686) it is submitted that the present suit may not be maintained.

II

RESPONDENT IS PRECLUDED BY THE TREATY OF BERLIN FROM QUESTIONING THE VALIDITY OF PUBLIC RESOLUTION 53

Assuming, *arguendo,* that the present action is within the jurisdiction of the courts below, we believe that respondent, a German corporation (R. 1), which, so far as the record reveals, does not even do business in the United States, is not in a position to question the validity of Public Resolution 53.

This Court, in *United States* v. *Dickelman,* 92 U. S. 520, stated the principle applicable to claims by a citizen of one sovereign against another sovereign (p. 524):

> One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a

> suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. * * * For all the purposes of its decision, the [instant] case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose. * * *

See also *Ware* v. *Hylton*, 3 Dall. 199, 230; *Frelinghuysen* v. *Key*, 110 U. S. 63, 71; *Chae Chan Ping* v. *United States*, 130 U. S. 581, 601, 609; *United States* v. *Chemical Foundation*, 272 U. S. 1, 11.

In the *Dickelman* case, the claimant, a Prussian citizen, was allowed to sue in the Court of Claims as a result of a special statute, growing out of diplomatic negotiation between Prussia and the United States. In the instant case, we submit that Resolution 53 has been authorized by, and is in fact based upon, treaties and agreements between the United States and Germany, and therefore respondent, as a German national who is bound by

these treaties and agreements, has no standing to question the validity of the Resolution.

The Treaty of Berlin was concluded between the United States and Germany on August 25, 1921, and proclaimed on November 14, 1921 (*infra*, pp. 67–73). That treaty, by Sections I and II, expressly reserved for the benefit of the United States all the beneficial provisions of the Treaty of Versailles. The Treaty of Versailles,[8] by paragraph (d) of Article 297, Section IV, Part X, provides as follows:

> As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, *all the exceptional war measures*, or measures of transfer, or *acts done or to be done* in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto *shall be considered as final and binding upon all persons* except as regards the reservations laid down in the present Treaty. [Italics supplied.]

Paragraph 3 of the Annex to Section IV, Part X, which defines the terms "exceptional war measures" and "acts in execution of these measures" reads as follows:

> In Article 297 and this Annex the expression "exceptional war measures" includes

[8] Reprinted in Senate Document No. 348, 67th Cong., 4th Sess., pp. 3329–3522. Portions referred to herein are set out in full in the Appendix, pp. 74–78, *infra*.

> measures of all kinds, legislative, administrative, judicial, or others, that have been taken or *will be taken hereafter* with regard to enemy property, and *which have had or will have the effect of removing from the proprietors the power of disposition over their property,* though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form, or in whatsoever place. *Acts in the execution of these measures include all detentions,* instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees. [Italics supplied.]

In brief, the treaties of Berlin and Versailles, taken together, confirm all actions that were taken *or would thereafter be taken,* by Congress in dealing with seized property. Since measures of "detention" are specifically allowed, the action taken

by Congress in Public Resolution 53 [9] is expressly sanctioned by the two governments.

Petitioners are advised by the Secretary of State that the German Government has made no claim that the Resolution is in conflict with these treaties. Nor has the German Government suggested that the Treaty of Berlin does not contain plenary authority for such action by the United States. This construction of the treaty by the political departments of the parties to it indicates that this Resolution cannot be considered as inconsistent with it.[10]

Respondent, a German national, is bound by the treaties of its sovereign. *Ware* v. *Hylton*, 3 Dall. 199; *Mairano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268; *Klein* v. *Palmer*, 18 F. (2d) 932 (C. C. A. 2d). We do not urge that these treaties deprive respondent of the privilege of resorting to our courts for the protection of its interests in appro-

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[9] The Resolution is, specifically, a measure of detention, not confiscation, for Congress has directed that the return of respondent's property be "postponed." Interest is accruing on the invested funds and current income is being collected on the securities, all of which will be paid to the respondent when the German Government resumes payment under the Debt Funding Agreement. (Section 23.) Moreover, it should be noted that to the extent that respondent suffers any loss by the postponement of payment, Germany has obligated herself to compensate the respondent. Part X, Sec. IV, Art. 297, par. (i), *infra*, p. 76.

[10] See Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II, p. 72; Edwin D. Dickinson, Note, in American Journal of International Law, Vol. 19, p. 161 (1925).

priate cases. Nevertheless, we do urge that the treaties have foreclosed, for this respondent, any question as to the validity of Resolution 53. By instituting the present suit respondent has placed itself in the anomalous position of attempting to question the validity of an act of the United States which may, if unlawful, be redressed only through its sovereign, when that sovereign does not claim that any wrong has been done. In other cases in which the validity of certain transfers of enemy property by the Alien Property Custodian were questioned, the courts have held that aliens are bound by the provisions of the Treaty of Berlin and cannot, therefore, complain of the action taken. *Klein* v. *Palmer,* 18 F. (2d) 932 (C. C. A. 2d); *Munich Reinsurance Co.* v. *First Reinsurance Co.,* 6 F. (2d) 742 (C. C. A. 2d), appeal dismissed, 273 U. S. 666; *Lange* v. *Wingrave,* 295 Fed. 565 (E. D. La.). See also *United States* v. *Chemical Foundation,* 272 U. S. 1, 11. We submit that a similar result should be reached in the present case.

III

PUBLIC RESOLUTION 53 IS CONSTITUTIONAL

Assuming, *arguendo,* that the courts have jurisdiction of the present action, and that the respondent has a standing to question the retention of property ordered by the Resolution, we come to the constitutional issue: does Public Resolution 53, as applied to this respondent, conflict with the Fifth Amendment to the Constitution?

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Respondent does not question the power of Congress to enact this Resolution insofar as it does not interfere with vested rights. Indeed, authority to enact it may be found in any one of a number of powers expressly granted to Congress. The Trading with the Enemy Act, as originally enacted, or as amended, finds its sanction in the war power in Article I, Section 8, clause 11, of the Constitution, which empowers Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Stoehr* v. *Wallace,* 255 U. S. 239; cf. *Commercial Trust Co.* v. *Miller,* 262 U. S. 51. Similarly, Public Resolution 53 may be so justified. Further, it may be considered as a measure necessary and proper for carrying into execution the provisions of the Treaty of Berlin reserving to the United States a lien on all German property for the benefit of American claimants. Authority to enact the Resolution may likewise be found in the power of Congress to make all needful rules respecting property which the United States has constitutionally ~~re-~~ acquired. Article IV, Section 3, clause 2; *Ashwander* v. *Valley Authority,* 297 U. S. 288, 330. Finally, the legislation may be looked upon as an exertion of the plenary power of Congress over international relations. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711.

Respondent, however, bases its claim for relief upon the contention that it has acquired, at some time, a right to the return of the property in

question which Congress may not impair. Petitioners believe that two factors are present which make it impossible to sustain that contention. First, the return of enemy property was in the nature of a gratuity, which Congress could, at any time, revoke or limit. Second, any rights acquired by respondent, a German national, were subject to the limitations of the treaties and agreements between the United States and Germany, and action taken pursuant to those treaties and agreements cannot, therefore, impair respondent's rights. These reasons will be discussed below in the order named.

A. THE RETURN OF PROPERTY AUTHORIZED BY THE SETTLEMENT OF WAR CLAIMS ACT OF 1928 IS AN ACT OF GRACE, AND THE AUTHORIZATION MAY, THEREFORE, BE WITHDRAWN AT ANY TIME

There can be no doubt that if the return of enemy property was an act of grace, no vested right in such property could have been acquired by respondent. The principle has recently been reiterated in *Lynch* v. *United States*, 292 U. S. 571, 577:

> * * * Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller*, 107 U. S. 64, 68; *Frisbie* v. *United States*, 157 U. S. 160, 166; *United States* v. *Cook*, 257 U. S. 523, 527. * * *

See also *In re Hoag,* 227 Fed. 478, 479 (S. D. N. Y.); *In re Goodwin,* 57 F. (2d) 31, 32 (C. C. A. 6th); *Field* v. *Giegengack,* 73 F. (2d) 945, 946 (App. D. C.). The issue, then, is whether the return of property seized by the Alien Property Custodian constitutes such a gratuity.

This Court and the lower Federal courts have frequently stated that upon the seizure of enemy property under the Trading with the Enemy Act the former owners were divested of every right they may have had in it. See *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, 453–454; *United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56; *Crone* v. *Sutherland,* 63 F. (2d) 895, 896 (App. D. C.); *Klein* v. *Palmer,* 18 F. (2d) 932 (C. C. A. 2d). It may be true, as pointed out by the court below (R. 17), that the United States has never intended to "confiscate" the property so seized, in the sense that it has never intended to convert it to its own use. But such an attitude is in no manner inconsistent with a complete power in Congress to deal with the property.

Bearing in mind this complete power of disposition, it becomes evident that it was an act of grace for Congress in the early amendments to the Trading with the Enemy Act,[11] and in the Set-

[11] By the Winslow Act of 1923 (c. 285, 42 Stat. 1511) Congress authorized the President to return up to $10,000 of seized property.

tlement of War Claims Act of 1928, to authorize a partial return of the property. This has been the uniform interpretation of these Acts by the courts. See *United States* v. *White Dental Mfg. Co.*, 274 U. S. 398, 402; *Chemische Fabrik von Heyden* v. *Tait*, 64 F. (2d) 295, 296 (C. C. A. 4th); *Krausz* v. *United States*, 14 F. Supp. 291, 294 (C. Cls.); *Kogler* v. *Miller*, 288 Fed. 806, 808 (C. C. A. 3d). We believe, therefore, that respondent has acquired no vested rights which are subject to the limitations of the Fifth Amendment.

The court below, however, while admitting that no vested rights may be created in a gratuity, and the fact that the United States had, upon seizure, complete control over the property, held that respondent, nevertheless, acquired vested rights beyond the power of Congress to impair. These rights, it felt, were created by the Settlement of War Claims Act, upon one, or all, of three different theories. We submit that each of the theories is untenable.

The first ground upon which the opinion below is based is that under certain circumstances mere moral or honorable obligations may, by recognition, become binding, or, in other words, create vested rights (R. 15–16). After examining the moral obligation of the United States to return the property here in question, the court concluded that the Settlement of War Claims Act did have that effect (R. 19).

The authorities cited to sustain this conclusion are *United States* v. *Cook*, 257 U. S. 523, and *United States* v. *Realty Co.*, 163 U. S. 427. Neither one, we submit, is precedent for the principle that an authorization of payment of an "honorable" or "moral" obligation is different from an authorization of payment of any other gratuity, which, of course, may be withdrawn at any time. *Lynch* v. *United States, supra.*

In *United States* v. *Cook, supra,* the plaintiffs, as architects, had made the plans and supervised the construction of a Government building in San Francisco. Their compensation was to be five percent of "the actual cost of the work." Because the work was delayed and the cost of labor and materials increased by the San Francisco earthquake and fire, Congress authorized the Secretary of the Treasury to make good to the building contractor his loss from the delay and enhanced prices so that he should receive enough to recoup him for his outlay, but without profit. The architects claimed that "actual cost" included the extra amount paid by the Secretary of the Treasury, and, when their claim was denied, brought an action in the Court of Claims. This Court sustained their contention that the "actual cost of the work" was not limited to the original contract price. The decision was simply a construction of the architects' contract. It does not even bear upon, let alone affirmatively treat of, the question whether Congress may repeal

an act of grace which recognizes an "honorable obligation."

In *United States* v. *Realty Company, supra,* it appeared that Congress, by an Act of 1890, had authorized the payment of a bounty to the producers and manufacturers of sugar. In reliance upon this Act many persons had incurred expenses or made financial commitments. In 1894 the Act of 1890 was repealed. In 1895, Congress nevertheless appropriated moneys to pay claimants who had complied under the original Act of 1890. The Treasurer of the United States, however, refused to pay the claimants who had fully complied, on the ground that the Act of 1895 was unconstitutional. This Court held that "There was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay" (page 440).

The sole question before the Court was the power of the Congress, by the Act of 1895, to recognize the claims as "debts" payable by the United States through appropriations under Article I, Section 8 of the Constitution. It is difficult to understand how the lower court could conclude from a case upholding the power of Congress to authorize a gratuitous payment, that Congress did not have the corollary power to direct that the payment of gratuities be postponed.

Indeed, in *Work* v. *Rives,* 267 U. S. 175, 181, 182, this Court apparently indicated that no limitation on the plenary power of Congress over gratuities was to be implied from the fact that the gratuity was based on equitable and moral considerations. Moreover, quite apart from authority, the distinction drawn by the lower court between gratuities which recognize "honorable obligations" and other types of gratuities presents many practical and logical difficulties. When is a gratuity the recognition of an honorable obligation and when is it not? Why is the payment of a pension any less a recognition of an "honorable obligation" than the payment of extra compensation to a contractor? What reason is there for creating this arbitrary line of cleavage? An attempt to answer these questions must indicate the confusion which such a distinction would create.

The second ground upon which the lower court rested its conclusion that vested rights had been created is that the Settlement of War Claims Act "placed the United States definitely in the position of trustee for the benefit of the former owners" (R. 18). It is often extremely misleading, of course, in questions dealing largely with public law, to couch an argument in private law concepts.[12] Aside from that factor, however, we submit that no trust could have been created.

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[12] See *United States ex rel. Angarica* v. *Bayard*, 4 Mackay 310, 322 (App. D. C.), aff'd, 127 U. S. 251.

The return of enemy property was, as we have shown, an act of grace. The Settlement of War Claims Act informed former owners that the United States was willing to transfer to them a portion of the property which it had seized and to which it held title. The Act in itself did not consummate the transfer; it merely authorized its consummation, just as a pension statute does not of itself pay the pension but merely authorizes its payment. Until enemy property is actually physically returned to the former owner, and until a pension is physically paid, the particular gratuity is not completed. Cf. *Frelinghuysen* v. *Key,* 110 U. S. 63, 73; *Boynton* v. *Blaine,* 139 U. S. 306, 325. In the case at bar the payment to the respondent which was authorized by the Settlement of War Claims Act was never made. To circumvent this fact by constructing a trust in favor of the respondent is to create legal incidents not contemplated by the Settlement of War Claims Act. It is a well established principle that an ineffective gift is not to be upheld as a declaration of trust. American Law Institute, Restatement of the Law of Trusts, Sec. 31, Comment (a) and (b). We submit, therefore, that the court below was in error in concluding that a trust had been created.

Moreover, assuming that Congress did, by the Settlement of War Claims Act, create a trust, we submit that Congress retained the power to revoke it. Neither the Trading with the Enemy Act nor

the Settlement of War Claims Act contains any direct or apt language creating the "trust" recognized in the lower court. In order to reach its conclusion the court simply referred to the policy of the United States not to appropriate enemy property to its own use, and stated that the Settlement of War Claims Act "recognized and put into final effect a policy adopted from the beginning of the war; that is to say, a policy of trusteeship rather than a policy of confiscation" (R. 18). That assumption, however, completely ignores the fact that there also exists a long-established policy of the United States to protect the interests of Americans who have claims against Germany, and to utilize the property seized either as satisfaction of American claims or as collateral to insure their ultimate repayment (see pp. 9–12, *supra.*). This policy was formally declared and established in the Peace Resolution of 1921, and repeated in the Treaty of Berlin. It is a policy that by its very nature is of more importance than any policy with respect to the ultimate claims of former enemies. If the policy of non-confiscation was sufficient to create a trust, the coexistent policy of protecting American claimants should likewise compel the conclusion that Congress has retained the power to revoke it, at least in the event of a German default.

In *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, this Court determined that in 1934 it was within the power of Congress to direct that the expenses incurred in the seizure and subsequent

administration of enemy property should be charged against it. The Court said (page 454):

> The original Act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration.

Likewise, it may be said that the Settlement of War Claims Act coupled with the Peace Resolution, the Treaty of Berlin, and the Trading with the Enemy Act in its earlier forms, plainly disclosed a reservation to Congress, in the event of a default by Germany, of a power to direct that enemy property should be retained.

The third ground upon which the court below based its conclusion that notwithstanding the original gratuitous nature of the return of enemy property vested rights had been created in respondent is that such rights were created when respondent complied with the terms of the Settlement of War Claims Act (R. 24). The fact that the respondent "agreed" to accept 80 percent and postpone the return of the 20 percent is stressed as a "meeting of the minds", creating a contract right.

If the complete and unquestioned power of Congress to retain all the property seized be borne in mind, it is clear that no contract such as that envisaged by the court could have come into existence.

The Settlement of War Claims Act was not a contractual offer, in any sense of the word; it merely authorized the repayment of 80 percent of the property then held by the United States. *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, 452. True, as a condition precedent to that return by the President or by a court, Congress required, for reasons which it deemed sufficient, that the former owners file a formal consent to the retention of the 20 percent. This consent could have been dispensed with. To assume that it can serve as consideration for a contract is to ignore completely the fact that respondent had no right to the return of the property which it could relinquish by such a consent. See *Choate* v. *Trapp,* 224 U. S. 665, 674–675. The respondent had been effectively divested of its rights and had none to relinquish. *United States* v. *Chemical Foundation,* 272 U. S. 1, 11; *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, 453–454.

We submit, therefore, that the Settlement of War Claims Act, which authorized the return of a portion of the enemy property, was an act of grace merely, and could not, and did not, upon any theory, create any vested rights in the respondent.

B. ANY RIGHTS ACQUIRED BY RESPONDENT, A GERMAN NATIONAL, WERE SUBJECT TO THE LIMITATIONS OF THE TREATIES AND AGREEMENTS BETWEEN THE UNITED STATES AND GERMANY

It is a familiar principle that existing laws are read into contracts in order to fix the terms of the obligation as between the parties. See

Williston, *Contracts,* Vol. 3, Sec. 615 (1936 ed.); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 435. Particularly should this be true in dealings between an individual and a sovereign. In other words, if by existing laws a sovereign has specifically reserved a power to act, any contract, and *a fortiori,* a contract which is not express but which is, at most, implied, as in the present case, should be interpreted as reserving that right of action to the sovereign.

In the instant case Congress is accused of violating the terms of a "contract" by a particular course of action. If the right to take that action was, however, reserved by Congress in legislation—including treaties or agreements binding upon the respondent—at the time the alleged contract was made, it is clear, we submit, that the contract has not been broken. Or, to express the thought in a different way, the contract had a "congenital infirmity" (see *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 308)—the fact that Congress might take such action as its laws or treaties then authorized.

In Point II, *supra,* at pp. 26–27, we have already pointed out that certain portions of the Treaty of Versailles, incorporated specifically into the Treaty of Berlin between the United States and Germany, reserved to the United States the power to take all measures with regard to enemy property "which have had or will have the effect of removing from the proprietors the power of disposition over their

property * * *."[13] The same reservation of all powers to deal with this property as it saw fit was incorporated by Congress in Sections 2 and 5 of the Peace Resolution of 1921 (*infra,* pp. 63–64).

In view of this express reservation of power by Congress, respondent, a German national who is bound by the treaties and agreements of its sovereign, cannot now be heard to claim that its alleged contract with the United States is violated by the exercise of the power which Congress had expressly reserved. The contract, if any there be, was created subject to the power of Congress to take action under the treaties.

Looked at from another point of view, it is unlikely that Congress could have intended, by the Settlement of War Claims Act, to forego the exercise of rights which it had theretofore so meticulously preserved. From the end of the War the United States was actively concerned with protecting the rights and claims of its own citizens which arose by reason of acts for which the German Government was responsible. A Mixed Claims Commission had been created to hear them (see *infra,* pp. 79–82) and by provisions of the Treaty of Versailles which were specifically incorporated into the Treaty of Berlin the United States had reserved

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[13] Treaty of Versailles, Annex to Article 297, Section IV, Part X, par. 3. See also Part X, Section IV, Article 297 (b), (h) (2), (e), and the Annex to Article 297, par. 4, all reprinted in the Appendix, *infra,* pp. 74–78.

the right to hold seized property as a pledge for Germany's liability.[14]

As already pointed out (p. 11, *supra*), the Settlement of War Claims Act authorized the 80 percent return to German nationals and made provision for the creation of a German Special Deposit Account, into which was to be paid the retained 20 percent. This German Special Deposit Account, augmented by appropriations of Congress, permitted the acceleration of payments to American nationals on account of the awards of the Mixed Claims Commission. It must be kept in mind that Congress realized that the 20 percent of enemy property to be retained was insufficient as a charge or pledge for complete payment of the awards rendered and to be rendered in favor of American nationals. To contend that Congress, in establishing a procedure for the ultimate return of 80 percent of enemy property, relinquished immediately and forever all of its rights therein, irrespective of what the future might bring, is to contend that Congress deliberately jeopardized the interests of American nationals to that extent. It is obvious, we submit, that the provisions governing the return of 80 percent of German property should not be construed, *ipso facto*, as a waiver of the rights of the United States arising by reason of its being

[14]Article 297 (e), (h) (2), *infra*, pp. 75–76. See also Article 297 (b), *infra*, p. 74.

one of the principal Allied Powers, or under the Treaty of Versailles as incorporated in the Treaty of Berlin, or under the agreement establishing the Mixed Claims Commission—rights which the United States had theretofore so meticulously preserved.

One further fact which should be noted is the reference by the court below to paragraph 4 of the Debt Funding Agreement of 1930 and paragraph (b) of the exchange of notes which accompanied that Agreement. By paragraph 4 the United States agreed "to accept the full faith and credit of Germany as the only security and guarantee for the fulfillment of Germany's obligations" under the Agreement. By clause (b) of the notes it was stipulated that "Nothing contained therein [in the Agreement] shall be construed as requiring the United States to release any German property which it now holds other than as heretofore or hereafter authorized by the Congress of the United States." (See *infra*, pp. 83, 87, 90–91). The exact significance to be attributed to these provisions is not made clear by the court below, but the implication is created that the Settlement of War Claims Act was an authorization "heretofore" made within the meaning of paragraph (b) which could not thereafter be changed.[15]

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[15] Wholly apart from the reservation contained in the notes, the "security" clause of the Debt Funding Agreement (par. 4) has no application here. The clause was merely a reiteration of the established policy of the United States to

The answer to this contention is apparent when it is noted that clause (b) of the notes referred to authorizations "heretofore *or hereafter*" made. This language, in other words, is consistent with the Congressional policy of retaining complete control over property seized under the Trading with the Enemy Act. Moreover, it must be apparent that the Agreement is no bar to the enactment of the Resolution because of the well-established principle that any treaty or agreement made by the United States with any foreign nation is subject to such acts as Congress may pass for its modification or repeal, particularly where the other nation has neglected to perform its engagements under the treaty or agreement. Cf. *Chae Chan Ping* v. *United States,* 130 U. S. 581, 600, 601; *Whitney* v. *Robertson,* 124 U. S. 190, 195; *Head Money Cases,* 112 U. S. 580, 599.

Finally, petitioners believe that Public Resolution 53 is not a violation of either the due process or just compensation clauses of the Fifth Amendment, for the effect of the Treaty is to reach into and control the application of the Amendment.

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refrain from the use of military sanctions to compel the payment of the financial obligations of Germany. Its effect was, apparently, to write what might be termed a version of the Drago doctrine, or the principle of the Hague Convention of 1907 respecting the limitation of the employment of force in the collection of public debts, into the intergovernmental financial relations of the United States and Germany. See Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Vol. 1, p. 563).

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Even should it be conceded that the mere postponement of payment of a claim against the United States constitutes a "deprivation" of property, it is not a deprivation without due process, for it is specifically authorized by the Treaty of Berlin, and that Treaty as to this respondent constitutes due process of law. Cf. *Tucker* v. *Alexandroff*, 183 U. S. 424 (1902); *Neeley* v. *Henkel*, 180 U. S. 109 (1901); *Ex parte Toscano*, 208 Fed. 938.

Nor does Public Resolution 53 take the respondent's private property for public use without payment of just compensation within the meaning of the Amendment. The German Government speaks for its citizens as to their claims against the United States, even where there is ~~priority~~ PRIVITY of contract between the United States and the German national. Therefore, even if the property has been so taken for public use, the respondent cannot complain because the German Government has obligated itself to pay it the "just compensation" which the respondent asserts is demanded by the amendment, and the German Government had authority to so agree for its national. Paragraph (i) of Article 297, Section IV, Part X of the Treaty of Berlin provides:

> Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interest in Allied or Associated States.

This Court has always been loath to permit the judiciary to take any action which would fetter the political department in meeting its responsibilities in international relations. *Mackenzie* v. *Hare,* 239 U. S. 299, 311; *Burnet* v. *Brooks,* 288 U. S. 378, 396; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 57; *Missouri* v. *Holland,* 252 U. S. 416.[16] There can be no doubt that the responsibility of procuring satisfaction by Germany of the claims of American nationals is upon the President and Congress (*Holzendorf* v. *Hay,* 20 App. D. C. 576). A decree ordering the payment to a German national contrary to legislation designed to assist in the settlement of international problems should be entered by this Court only with the greatest reluctance, because this legislation is merely one step in the general plan of dealing with the war debts and war compensations. Cf. *Taylor* v. *Morton,* 2 Curtis, C. C. 454, aff'd, 2 Black 481; *Head Money Cases,* 112 U. S. 580, 598; *Chae Chan Ping* v. *United States,* 130 U. S. 581.

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[16] See also Weston, *Political Questions*, Harvard Law Review, Vol. 38, p. 296, 315–316; Finkelstein, *Judicial Self-Limitation*, Harvard Law Review, Vol. 37, p. 338, 347; Field, *The Doctrine of Political Questions*, Minnesota Law Review, Vol. 8, p. 485; Dickinson, *International Political Questions in the National Courts*, American Journal of International Law, Vol. 19, p. 157.

CONCLUSION

Wherefore, we submit that the decision below should be reversed and the bill dismissed.

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